No. 22702

United States Court

Of Appeals

FOR THE

Ninth Circuit

ETHEL JIMISON and RAY JIMISON,

Plaintiffs and Appellants,

vs.

UNITED STATES OF AMERICA,

Defendants and Appellee.

On appeal from the United States District Court for the District of Montana, Billings Division

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REPLY BRIEF OF APPELANTS

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SUMMARY OF ARGUMENT

The main point raised by appellee is that this Court is limited in review of this case because of the provisions of Rule 52(a). The unanimous rule, necessarily, is that when an error of law has been made, as in this case, a finding attributed to or influenced by such error may be fully reviewed.

The rule that one is charged with seeing what is in plain sight and the question of Bucciarelli's negligence, both dwelt upon by appellee in its brief are not germane to this appeal. The question is whether or not the appellee should be held responsible for the consequences of its admitted negligence. Appellee has shown no logic, authority or precedent to sustain the District Court's ruling.

The District Court's conclusion (argued in the opening brief as specification of error Number 2) that Bucciarelli had a clear unobstructed view of the obstruction placed in the highway is likewise reviewable without reference to Rule 52(a) because the conclusion is based upon undisputed facts.

ARGUMENT

(Relative to appellants' Specification of Errors No. 1)

The main contention of appellee is that the lower court should be upheld because its finding that the government's admitted negligence was superseded, was one of fact entitled to the protection of Rule 52(a). (appellees brief pp. 7, 9, 10, 22 and 23).

Assuming, arguendo, that a finding of intervening cause is a finding of "fact", the next question is whether or not such a finding should be upheld if it is induced by an erroneous view of the law.

The lower court ruled that one who negligently obstructs a highway is excused from the consequences of his negligence if a colliding highway user saw or should have seen the obstruction in time to avoid it. This ruling was erroneous.

As a matter of logic and well settled law, a finding is not entitled to the protection of Rule 52(a) if the court in making such finding did not apply proper

legal standards. See **Moore's Federal Practice, Vol. 5. pp. 2630-2631.**

"The 'unless clearly erroneous' doctrine, discussed above, applies only to appellate review of findings of fact. It does not apply to the district court's conclusions of law. This is clear from the context of the Rule and from long established principles both at law and in equity that the appellate court is, of course, not concluded by the trial court's view of the law. The requirement in Rule 52(a) that, in addition to finding the facts, the district court shall 'state separately its conclusions of law thereon' is to furnish the casual link between the facts and the judgment rendered. But in reviewing the judgment, so far as questions or conclusions of law are concerned, the appellate court is not concluded in any degree by the trial court's view of the law.

Findings of fact that are induced by an erroneous view of the law are not binding. Nor are findings that that combine both fact and law, when there is error as to the law."

See also **United States v. United States Gypsum Co. (1948), 333 US 364, 68 S. Ct. 525, 92 L. Ed. 746.**

"We turn now to a different phase of the case — the correctness of the findings. The trial court made findings of fact which if accurate would bar a reversal of its order. In Finding 118 the trial court found that the evidence 'fails to establish that the defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices.' The opinion indicates that in making this finding the trial court assumed arguendo that dec-

larations of one defendant were admissible against all. 67 F. Supp. at page 500. In examining the finding we follow Interstate Circuit v. United States, 306 U.S. 208, 59 S.Ct. 467, 83 L. Ed. 610, and United States v. Masonite Corp., 316 U.S. 265, 62 s Ct. 1070, 86 L.Ed. 1461, as to the quantum of proof required for the government to establish its claim that the defendants conspired to achieve certain ends. In those cases, as here, separate identical agreements were executed between one party and a number of other parties. This Court, in Interstate Circuit, concluded that proof of an express understanding that each party would sign the agreements was not a 'prerequisite to an unlawful conspiracy.' (306 U.S. 208, 59 S.Ct. 474). We held that it was sufficient if all the defendants had engaged in a concert of action within the meaning of the Sherman Act to enter into the agreements. In Masonite the trial court found that the defendants had not acted in concert and that finding was reversed by this Court. One of the things those two cases establish is the principle that when a group of competitors enters into a series of separate but similar agreements with competitors or others, a strong inference arises that such agreements are the result of concerted action. That inference is strengthened when contemporaneous declarations indicate that supposedly separate actions are part of a common plan.

In so far as Finding 118 and the subsidiary findings were based by the District Court on its belief that the General Electric rule justified the arrangements or because of a misapplication of Masonite or Interstate Circuit, errors of law occurred. These we can, of course, correct. In so far as this finding

and others to which we shall refer are inferences drawn from documents or undisputed facts, heretofore described or set out, Rule 52(a) of the Rules of Civil Procedure is applicable. That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial, court when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Emphasis supplied)

The case **of Maragakis vs. United States (CA 10th 1949) 172 F. 2d 393** is helpful. In that case suit was brought against the United States under the Tort Claims Act because a vehicle operated by a United States employee collided with a parked car occupied by plaintiffs. The trial court ruled that the govern-

ment was not negligent. The appellate Court reversed saying:

> "The trial court, of course, has the right and duty to judge and appraise human conduct and behavior as applied to factual circumstances, and we are not warranted in overturning its appraisal of the facts when judged by the applicable standard of care, unless we are convinced that its judgment is clearly erroneous. We think, however, in this case that the trial court misconceived the standard of care by which the negligence of the Government driver is to be judged and in so doing failed to correctly appraise the facts in the light of the legal duty.
>
> Since the trial court has found the appellants non-negligent and no appeal is taken therefrom, the question of their negligence is not open here, and we have no occasion to consider their contributory negligence as a defense to the appellee's negligence.
>
> The case is reversed and remanded with dirctions to assess the damages and enter judgment accordingly."

In the **Maragakis** case the lower court did not set forth an erroneous conclusion of law or legal standard, as the lower court did in the case at bar. It simply made findings which the appellate court assumed must have necessarily been made without consulting consulting controlling principles. The higher court did not simply reverse but entered judgment for plaintiff and referred the case only for assessment of damages.

Another case for the proposition that findings

made under an erroneous view of the law are not protected by Rule 52(a) is **J. D. Hedin Construction Co. v. F. S. Bowen Electric Co., (DC CA 1959) 273 F.2d 511.** In that case one of the complaints made on appeal was that the lower court had applied incorrect principles in finding and awarding $30,000.00 damages. The appellate court set the judgment aside and remanded for further proceedings, saying:

> "In situations like the present, the innocent party is entitled to recover the loss of profit resulting from the breach of contract. The measure of the loss is the contract price less the costs which plaintiff would have incurred in completing his contract obligation. See, generally, M & R Contractors & Builders, Inc. v. Michael, 1958, 215 Md. 340, 138 A.2d 350. Such costs are to be estimated as nearly as may be according to 'the circumstances that existed at the time of breach.' See 5 Corbin, Contracts Sec. 1094, at 426 (1951); Carras v. Birge, Tex. Civ. App. 1948, 211 S.W.2d 998. Cf. Sternberg Dredging Co. v. Dawson, 1926, 171 Ark. 604, 285 S.W.32 We are unable to say that the trial judge followed this principle in awarding damages to the plaintiff, in fact, the indications are that he did not.

Plaintiff appellee urges that the judgment be sustained, arguing that a general verdict by a jury or by a judge sitting alone, awarding $30,000.00 to this plaintiff for the loss of a valuable contract, would have been within the bounds of reasonableness, and within the trier's prerogative of picking and choosing between bits of conflicting testimony. Be that

as it may, it is not a sufficient answer. The jury must, after all, act only on proper instructions. The judge sitting as trier of the facts must act on a sound legal and evidentiary basis; if his statements and actions indicate that he did not do so, to the serious prejudice of an appellant, correction must follow."

See also the case of **Owen v. Commercial Union Fire Ins. Co. of New York, (CA 4th 1954) 211 F.2d 488,** where the appellate court reversed a finding of fraud, saying:

"This is an appeal by plaintiff in a fire insurance case, heard by the trial judge without a jury and decided in favor of defendant on the ground that plaintiff had violated the policy provision against fraud and false swearing. The trial judge held that the burden of proof rested upon the plaintiff 'to prove, by the weight of the credible evidence, that he has not been guilty of wilfully concealing or misrepresenting any material fact or circumstance.' This was clearly erroneous. The burden of proof rested upon the defendant to establish the fraud alleged. United States Fire Ins. Co. v. Merrick, 171 Md. 476, 190 A. 335; Imperial Assur. Co. v. Joseph Supornick & Son, 8 Cir., 184 F.2d 930; Benanti v. Delaware Ins. Co., 86 Conn. 15, 84 A. 109, Ann. Cas. 1913D, 826 and note; 29 Am. Jur. p. 1078-1079. And we think that the error is of such a nature that we should vacate the judgment and remand the case for further hearing. The rule that an appellate court will not disturb findings of fact made by the trial judge unless they are clearly erroneous does not apply if he has committed an error of law which has

manifestly influenced or controlled his findings of fact, such as mistake as to the burden of proof. 3 Am. Jur. p. 472; Hall v. Hall, 41 S.C. 163, 19 S. E. 305, 44 Am. St. Rep. 696; Chase v. Woodruff, 133 Wis. 555, 113 N. W. 973, 126 Am. St. Rep. 972. While we might pass upon the facts ourselves without giving weight to the findings of the lower court in view of his error as to the burden of proof, we think it better, in view of the highly controversial character of some of the questions involved, that they be passed upon in the first instance by the court that has had the advantage of seeing and hearing the witnesses."

The following cases are all in point and are all to the effect that the 'clearly erroneous' rule set forth in Rule 52(a) does not apply if the finding was reached because of, or influenced by, an incorrect view of the controlling law. **Davis v. Parkhill-Goodloe Company (CA 5th, 1962) 302 F.2d 489; McGowan v. United States (CA 5th, 1961) 296 F.2d 252, 254; Mastercrafters Cock & Radio Co. v. Vacheron & Constantin-Lecoultre Watches, Inc. (CA 2d, 1955) 221 F. 2d 464; Continental Motors Corp. v. Continental Aviation Corp. (CA 5th, 1967) 375 F.2d 857.**

The District Court erred in selecting the law to guide it in reaching a decision which selection was decisive in the Court's finding that the United States should be absolved from its negligence. This decision is freely reviewable on appeal without regard to any

limitation contained in Rule 52(a).

The standard used by the District Court was that the United States was excused from the consequences of its negligence if driver Bucciarelli saw or should have seen the negligently placed obstruction in time to avoid it. That this standard was erroneous is abundantly demonstrated in the initial brief. Appellee has produced no authority in support of the Court's ruling.

The decision cannot be and isn't defended as logical or on the basis of precedent. Appellee cites the case of **Boepple v. Mohalt, 101 Mont. 417, 54 P.2d 857,** (appellee's brief pp. 6, 7 and 8) and says that our initial brief "ignores" certain pertinent parts of this opinion. (appellee's brief p. 8). We pointed out in our opening brief at length (appellants' brief pp. 19-22) that the **Boepple** case was not authority for the problem in this case. That case was concerned only with whether or not Mr. Mohalt was negligent, the question of intervening cause or the effect of another's negligence was not before the court. It is true the court did speculate briefly on a question not before it, "Even if it were true - - - ". However, this musing or speculation must be treated for what it is, simple **obiter dictum.** This **obiter dictum** is what appellee relied on in the court below and relies on here as the sole basis for urging that Montana has adopted an

illogical position condemned by text writers, at variance with the nearly unanimous law of other jurisdictions and contrary to Montana precedent in similar cases. The statement relied upon by appellee (appellee's brief p. 8) is not helpful at all if it is considered with reference to the question which the court was deciding.

The **Boepple** case is authority for the rule that in negligence law one is charged with seeing that which is in plain sight. That is the only reason that the **Boepple case** was relied upon in the case of **Monforton v. Northern Pacific Railway Company, 138 Mont. 191, 355 P.2d 501.** (cited in appellee's brief at pp. 7, 8 & 22). We fail to see the relevance of this rule to the issues raised by this appeal. First of all the rule does not apply if the object to be seen is in any way obscured or not such that it must have been seen by an ordinary lookout. **Morrison v. City of Butte, ... Mont....., 431 P.2d 79.** Secondly the rule does not aid the appellee in any matters germane to this appeal and is irrelevant to any matters before the court in this case.

The latter observation applies, also, to that portion of appellee's brief dealing with the negligence of Bucciarelli (appellee's brief pp. 18-22). The question is not whether Bucciarelli was negligent but whether the appellee should escape responsibility for the negli-

gence which appellee admits. See appellee's brief page 4.

> "In all of its post-trial briefs before the trial court the government assumed the position that its prior negligence in creating the hazardous condition on the bridge had been established by the evidence and confined its argument to the questions of proximate cause and intervening cause."

ARGUMENT — Relative to Appellants' Specification of Errors No. 2

We do not believe this Court will opt for the rule urged by appellee and adopted by the lower court. Only if it does so will it be necessary to consider the question of the propriety of the court's finding that Bucciarelli had " - - - a clear, unobstructed view of both the car and crane for at least half a mile." (Vol. I, p. 236). The crane was a small machine 4 foot square constructed of angle iron. (Tr. 11, Ex.2) The Jimison automobile was between it and Bucciarelli. (Tr. 59-62) To say that Bucciarelli's view was clear asd unobstructed is simply to find contrary to all the evidence. Bucciarelli could have seen the bridge crane sometime before the collision provided 1. He was far enough behind the Jimison automobile to see over it to the crane which was on a slightly higher elevation (Ex. 16 & 11) and 2. He was not so far behind that the Jimison automobile was already hiding the crane when he come to the place it would ordinarily be visible. No

evidence of this sort was offered. The only evidence on the distance between the automobiles was offered by the appellee's witness, Ramsbacher, who said they were close together for the half mile which he observed them (Tr. 32-36, 110) indicating Bucciarelli's view of the crane was probably at all times blocked by the Jimison automobile he was following. Appellee in its brief seeks to dispute the eyewitness version of its own witness, not with evidence but with some mathematical computations (appellee's brief pp. 16 & 17). Jimison said he passed Bucciarelli approximately six or seven miles before he came to the bridge after which he proceeded at a rate of 60 to 65 miles per hour (Tr. 52-53) until about ¾ of a mile from the bridge where he slowed (Tr. 54-56). Bucciarelli said he was traveling 55 to 60 miles per hour, that Jimison passed him three or four miles before he came to the bridge (Tr. 122) and that he continued to travel at 60 miles per hour until immediately before the collision (Tr. 125). The evidence is all to the effect that the automobiles were at least fairly close to one another. The mathematical computations based on estimates are of no value at all.

The evidence as to whether Bucciarelli had a clear and unobstructed view of the crane is undisputed. The rule followed in such a case is set forth in **Stevenot v. Norberg (CA 9th, 1954) 210 F.2d 615.**

"Appellees argue that, whether or not they had enforceable contract rights to continued employment, the District Court, in the exercise of its supervisory power over its Trustee, properly ordered their reinstatement. In this connection, they remind us the Court found, in its final order, that restoration of appellees to their jobs would have no adverse or harmful effect upon the proper administration and preservation of Debtor's business and estate; but, 'on the contrary, such reinstatement, with restitution of earnings lost by petitioners (appellees) by reason of said wrongful lay-off and discharge, will be for the best interests of the Debtor Company.' Appellees argue that we are bound by the foregoing findings, since the record does not show that they are clearly erroneous. We do not think so. When a finding is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings shall not be set aside, unless clearly erroneous, but is free to draw its own conclusions."

See also **Brown v. Cowden Livestock Co., (CA 9th, 1951) 187 F.2d 1015.**

"In our opinion, whether these July 16th transactions amounted to approval of the act of Adams in collecting the purchase price or whether they created a virgin agreement between appellee and Adams, the legal result was the abondonment of the claim, if any, of appellee against appellants and the substitution or creation of a liability from Adams to appellee. This conclusion is required upon a record which shows that there is no dispute as to what

happened in the July 16th transactions. The findings of the District Judge in this regard are in effect findings as to the effect of these transactions rather than findings which resolve disputed facts. Hence we do not find ourselves obstructed by the traditional rule not to disturb findings of fact of the trial court. We are therefore free to make our own determination as to the legal conclusion to be drawn."

The following cases are helpful on this point, also. **Weible v. United States (CA 9th, 1957) 244 F.2d 158, Kippen v. American Automatic Typewriter Company, (CA 9th, 1963) 324 F.2d 742, 745, Fleischmann Distilling Corp. v. Maier Brewing Company, (CA 9th, 1963) 314 F.2d 149, Lundgren v. Freeman (CA 9th, 1962) 307 F.2d 104.**

CONCLUSION

Mr. Jimison's car was damaged and Mrs. Jimison was injured by the admitted negligence of the appellee through no fault or action of their own. Excusing the government from the consequences of its negligence is unfair to the Jimisons and contrary to the basic tort law idea of responsibility for wrong. Such an awkward result can be accepted only if there is some overriding purpose to be served or the decision is supported by an unassailable body of precedent, neith-

er of which situations obtain in this case.

It is respectfully urged the cause should be reversed and remanded for a new trial.

Respectfully submitted.

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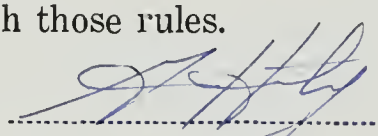
I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.



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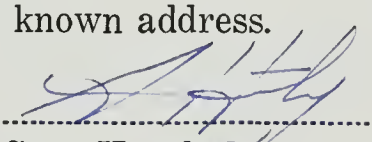
I, Gene Huntley, one of the attorneys for Plaintiffs and Appellants in the above-entitled action, hereby certify that on the 14 day of February, 1969, I served the within brief upon Clifford E. Schleusner and Moody Brickett, attorneys for Defendant and Appellee by depositing three copies in the United States mails, postpaid, addressed to them at the U. S. Attorneys Office, Federal Building, Billings, Montana, their last known address.



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